

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

CIVIL ACTION NO.: 14-CV-1304
14-CV-1307

JAMES H. FISCHER,
Plaintiff,

v.

STEPHEN T. FORREST, JR.
SANDRA F. FORREST,
SHANE R. GEBAUER, and BRUSHY
MOUNTAIN BEE FARM, INC.
Defendants.

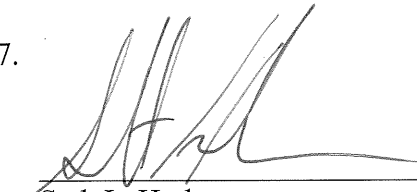
AFFIDAVIT OF SETH L. HUDSON

1. I am over the age of eighteen (18) years, of sound mind, and competent to testify as to the matters contained herein.
2. I am a partner with the law firm of Clements Bernard Walker, PLLC. I am fully familiar with the facts set forth in this Declaration which I submit on behalf of my clients, Stephen T. Forrest, Jr., Sandra F. Forrest, Shane R. Gebauer, and Brushy Mountain Bee Farm, Inc.
3. Annexed hereto as Exhibit A are excerpts from the transcript of the deposition testimony given by James Hendon Fischer on February 15, 2017 in this action.
4. Annexed hereto as Exhibit B are excerpts from the transcript of the deposition testimony given by Shane R. Gebauer on December 16, 2016 in this action.
5. Annexed hereto as Exhibit C are excerpts from the transcript of the deposition testimony given by Sandra F. Forrest on February 10, 2017 in this action.
6. Annexed hereto as Exhibit D are excerpts from the transcript of the deposition testimony given by Stephen T. Forrest, Jr. on February 10, 2017 in this action.
7. Annexed hereto as Exhibit E is a true and accurate copy of excerpts from Fischer's discovery responses dated March 14, 2017.

8. Annexed hereto as Exhibit F is a true and accurate copy of an email from Plaintiff James Fischer to the undersigned dated July 21, 2015.
9. Exhibits 8, 10, and 13 of the attached Memorandum In Support of Summary Judgment are a true and accurate copy of the copyright deposit copy submitted by Mr. Fischer, including a pdf version of the submission for ease of viewing and submission to the Court.

I, under the penalty of perjury, hereby state that all statements and averments made herein are true and correct.

This the 17th day of April, 2017.


Seth L. Hudson

SWORN TO AND SUBSCRIBED before me this the 17 day of April, 2017.


NOTARY PUBLIC

MY COMMISSION EXPIRES: 1/22/2022

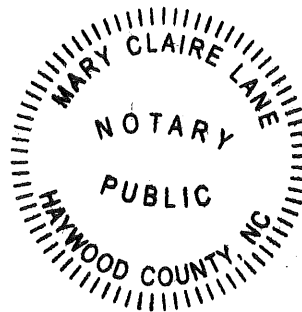


Exhibit A

1 FISCHER 103
2 copyrighted works, plural, yes.
3 MR. HUDSON: This will be 19.
4 (Whereupon, Bee-Quick brochure was
5 marked as Defendant's Exhibit 19 for
6 Identification.)
7 Q. Mr. Fischer, I've placed in front of you
8 what's been marked Defendant's Exhibit 19 (handing).
9 We've been talking about a Bee-Quick trifold
10 brochure.
11 Is Defendant's Exhibit 19 a copy of that
12 brochure?
13 A. This is different -- a different
14 version. This is a derivative.
15 Q. What do you mean it's a derivative?
16 A. It's a derivative work.
17 MR. MICHELEN: May I see?
18 THE WITNESS: Notice the bullet points
19 there (handing), below the logo.
20 Q. When you say bullet points -- I don't
21 see any bullet points, but I do see a number of
22 sentences.
23 MR. MICHELEN: He means the bullet
24 points -- no bees are harmed -- do you see
25 those?

1 FISCHER 104
2 MR. HUDSON: I see.
3 A. Those are the dead giveaway, the bullet
4 points are different, and so is the text above them.
5 Q. When would you have created Defendant's
6 Exhibit 19?
7 A. Well, it purports to be 12/2000, but it
8 doesn't look like the 2000s. The text is different.
9 So I don't know what the story is with this. Where
10 did you get this?
11 Q. What is different on the 2000 trifold
12 brochure that you recollect and the one you have
13 that's marked Defendant's Exhibit 19?
14 A. Well, the whole front panel here is
15 different. This would be the front, with the logo
16 (indicating).
17 MR. MICHELEN: Let the record reflect
18 that he's done a trifold on Exhibit 19, and
19 he's referring to the right-hand column on the
20 front page.
21 A. So everything below the logo is
22 different. This may have been a draft copy. I
23 don't know what it is, but it's not authentic. It's
24 not the real McCoy.
25 Q. I have something that might help you.

1 FISCHER 106
2 Q. Okay.
3 A. So someone was being asked to
4 participate in the wording of the brochure.
5 Q. Let's look at the phrase, a natural,
6 non-toxic blend of oils and herbal extracts, okay?
7 A. Yes.
8 Q. Is Bee-Quick a natural product?
9 A. Yes.
10 Q. Is Bee-Quick non-toxic?
11 A. Yes.
12 Q. Does Bee-Quick contain oils?
13 A. Yes.
14 Q. Does Bee-Quick contain herbal extracts?
15 A. Yes.
16 Q. So is Bee-Quick a blend of oils and
17 herbal extracts?
18 A. Yes.
19 Q. So really, the phrase a natural,
20 non-toxic blend of oils and herbal extracts
21 describes the Bee-Quick product, correct?
22 A. Yes.
23 MR. MICHELEN: Note my objection.
24 But you can answer.
25 A. Yeah.

1 FISCHER 107
2 MR. HUDSON: Can you please state your
3 objection for the record?
4 MR. MICHELEN: You're attempting to
5 phrase it as a legal conclusion of a lay
6 witness, but I'll allow him to answer. It's a
7 form objection.
8 MR. HUDSON: I just wanted to know so I
9 could rephrase the question.
10 Q. Mr. Fischer, is Bee-Quick a natural,
11 non-toxic blend of oils and herbal extracts?
12 A. Yes.
13 Q. Can almond oil be used as a honey
14 harvesting aid?
15 A. Well, there's multiple kinds of almond
16 oil, so I think you're trying to use a slang word to
17 describe a specific extracted form of what is
18 generically called almond oil.
19 Q. Can any form of almond oil be used as a
20 honey harvesting aid?
21 A. Almond oil is a slang term for something
22 that you could use in baking that if you used it in
23 sufficient concentration could repel bees, yes.
24 Q. What is almond oil slang for?
25 A. The specific chemistry would be a mix of

1 FISCHER 109

2 A. Yes.

3 Q. Let's look at the phrase, a safe,

4 gentle, and pleasant way to harvest honey.

5 Is Bee-Quick safe to use?

6 A. Yes.

7 Q. Is it gentle on the bees?

8 A. Yes.

9 Q. Is it pleasant to use?

10 A. I think so.

11 Q. Does one use Bee-Quick to harvest honey?

12 A. I'm sorry?

13 Q. Does one use Bee-Quick to harvest honey?

14 MR. MICHELEN: Is that what it's used

15 for?

16 A. Does who?

17 MR. MICHELEN: One.

18 A. Oh, a third person, yes, yes, yes, okay.

19 He switched to the third person plural.

20 Q. Sorry. Let me ask a better question.

21 Does a beekeeper use Bee-Quick as a

22 honey harvester?

23 A. Yes. Okay. I'm sorry, you just

24 switched tense there.

25 Q. I'm sorry.

1 FISCHER 119

2 Q. I'm going to show you what's been marked

3 Defendant's Exhibit 24 (handing).

4 I think you'll agree with me that

5 appears to be John F. Kennedy?

6 A. Yes.

7 Q. Did you take that picture of John F.

8 Kennedy?

9 A. Of course not.

10 Q. Did you take the picture that's marked

11 Defendant's Exhibit 24?

12 A. No.

13 Q. I'm going to show you what's been marked

14 Defendant's Exhibit 25 (handing).

15 Did you take the picture that's shown on

16 Defendant's Exhibit 25?

17 A. No.

18 Q. Are you aware that on your February 7,

19 2011, submission to the Copyright Office, you

20 submitted a number of countries' flags?

21 A. As I said, there were a number of things

22 that were included in error due to a tree selection

23 error in the backup, meaning in restoring the

24 backup.

25 Q. Do you remember if your February 7,

1 FISCHER 131

2 A. Well, we've added over time, haven't we?

3 It's an ever-growing cast of thousands.

4 Q. So is it your testimony here today that

5 any time you use Defendants, you may not mean every

6 single defendant in the case?

7 THE WITNESS: I think we're getting into

8 that legal stuff, aren't we?

9 MR. MICHELEN: At least ask him about

10 the one that he drafted.

11 MR. HUDSON: I can ask him about this

12 one. This is substantially similar to --

13 A. It's basically the same thing. We

14 picked up the language pretty much identical. You

15 know, when I wrote this, yes, the only defendants

16 were Steve and Sandy. When we added on Shane and

17 Brushy, I'm sorry, I did not put in asterisks and

18 stars and 27 photographs with the paragraphs and

19 pictures and arrows on the back indicating which --

20 you know, the whole Alice's Restaurant thing. I

21 didn't do that. Why? Because I'm not a lawyer. I

22 did the best I could.

23 Q. You also alleged that all of the

24 defendants removed a copyright notice.

25 A. Yes.

1 FISCHER 132

2 Q. What copyright notice?

3 A. The copyright notice attached to the

4 materials that were sent to them.

5 Q. What materials that were sent to them?

6 A. Well, for example, you've provided a

7 couple of copies of the brochure, and they have

8 copyright notices on them, don't they? And by

9 removing the copyright notice, they continued to use

10 the text without license. License would be selling

11 the product.

12 Q. Did the defendants make copies of your

13 brochures?

14 A. They may have. I don't know. They may

15 have, because if they ran out, they may have found

16 it easier to just run them off on the Xerox machine

17 themselves than get more printed from me or from

18 Dadant.

19 MR. MICHELEN: But that's not part of

20 the claim.

21 THE WITNESS: No, that's not part of --

22 yeah, that's true.

23 Q. Just to be clear, are you alleging that

24 the defendants copied any of your fliers without

25 copyright notices on them?

1 FISCHER 133

2 MR. MICHELEN: Did they copy your

3 brochure without the copyright notice on it?

4 A. Without? Did you say without the --

5 Q. Yes.

6 A. No, I'm not alleging that they ever made

7 a copy of my brochure without the copyright notice.

8 The only time they would have done that is when they

9 were selling the product, and they wouldn't have

10 bothered to remove the copyright notice then.

11 Q. But you have alleged that they removed

12 the copyright notice.

13 A. Yes, that's removal of the CMI.

14 Q. On what? I'm trying to get at -- I

15 don't understand what copyright notice they removed

16 if they didn't make a copy of the flier.

17 A. Why don't you go back to Engelmayer's

18 denial of the first motion to dismiss back in

19 January of 2015? Because he explains it really well

20 there. That's really a very succinct explanation,

21 and that explanation of how simply changing

22 Fischer's Bee-Quick to Natural Honey Harvester to

23 him is sufficient removal of CMI right there. The

24 replacement of Fischer with Natural -- in other

25 words, the name Fischer in the text, he thought that

1 FISCHER 137

2 Q. So we have a clear record, how many

3 sentences are you alleging that Brushy Mountain and

4 the rest the defendants removed from your brochure?

5 A. Four.

6 Q. You mentioned earlier you're alleging

7 that you had some photos that were embedded with

8 metadata; is that correct?

9 A. Yes.

10 Q. And is your allegation that Brushy

11 Mountain removed the metadata from these images?

12 A. Yes.

13 Q. How did they do that?

14 A. Probably through copying it with a

15 program that doesn't -- doesn't copy over the

16 metadata, or erases it deliberately.

17 Q. How did you determine that Brushy

18 Mountain removed the metadata?

19 A. Because their JPEG contains zero

20 metadata.

21 Q. And who at Brushy Mountain would have

22 removed the metadata?

23 A. Who?

24 Q. Yes.

25 A. I have no idea. Shane was hired to be

1 FISCHER 138

2 the big web expert, so the Forrests are denying

3 doing anything technical in that regard. So I guess

4 we're left with Shane, because at that time, there

5 was no one else to do that work.

6 Q. Are the photos of Bee-Quick that were

7 contained on Brushy Mountain's website your photos?

8 A. Yes.

9 Q. Do you have any evidence that Shane

10 Gebauer removed the metadata from your photos?

11 A. No, I have no evidence. I only have

12 process of elimination.

13 Q. Do you have any evidence that Steve

14 Forrest removed any metadata from your photos?

15 A. Specifically with his own two hands, no.

16 Q. Do you have any evidence that Sandra

17 Forrest removed any metadata from your photos?

18 A. No. But it happened, and I'd like to

19 know who, if not them, authorized that. Because

20 that's just as bad as doing it.

21 Q. Do you have any evidence that Shane

22 Gebauer authorized the removal of the metadata?

23 A. He claims he's CEO. Before that, he was

24 general manager. I don't think that anything

25 happened at that company that he didn't at least

1 FISCHER 140

2 Do you have evidence?

3 Q. What evidence do you have that shows

4 Shane Gebauer removed --

5 MR. MICHELEN: Just answer the question.

6 Q. -- metadata --

7 A. I have no such evidence.

8 Q. So we have a clear record, do you have

9 any evidence that Shane Gebauer authorized anyone to

10 remove the metadata from your photographs?

11 A. No.

12 Q. And I'm not sure if I asked this, so if

13 it's a repeat, I apologize.

14 A. It's okay.

15 Q. Do you have any evidence that Steve

16 Forrest authorized anybody to remove your metadata

17 from your photographs?

18 A. Other than owning the company lock,

19 stock, and barrel at the time? No.

20 Q. Do you have any evidence that Sandy

21 Forrest authorized anybody to remove the metadata?

22 A. Same answer as Steve. Other than owning

23 the company, no.

24 Q. Do you have any evidence that Shane

25 Gebauer removed your copyright notice?

1 FISCHER 141

2 A. We just talked about that, extensively.

3 MR. MICHELEN: He asked about Steve and

4 Sandy. I don't know if he asked specifically

5 about Shane.

6 A. Yeah, you asked about Shane.

7 Q. What was your answer?

8 A. I said no. There's no smoking gun here.

9 I don't have video.

10 Q. Do you have any evidence that Shane

11 Gebauer ordered the verbatim display of your

12 copyrighted works?

13 A. Well, once again, it's like who else

14 would give that order except one of those three.

15 But no, no specific e-mail, no specific phone call,

16 nothing.

17 Q. Do you have any evidence whatsoever to

18 prove that Shane Gebauer ordered the verbatim

19 display of your copyrighted works?

20 A. Pending deposing the entire staff that

21 reported to him, no.

22 Q. Do you have any evidence that Steve

23 Forrest ordered the verbatim display of your

24 copyrighted works?

25 A. No.

1 FISCHER 142

2 Q. Do you have any evidence that Sandra

3 Forrest ordered the verbatim display of your

4 copyrighted works?

5 A. No.

6 Q. Do you have any evidence that Shane

7 Gebauer oversaw, participated in the verbatim

8 display of your copyrighted works?

9 A. Yes.

10 Q. What evidence do you have?

11 A. The sworn testimony of the Forrests

12 themselves in their deposition.

13 Q. What did they say?

14 A. They said that Shane did all the website

15 and catalog work starting from two years after his

16 hiring by the Forrests, which was 2007. So

17 everything after 2009, the Forrests say Shane did,

18 or was at least in charge of and responsible for.

19 Q. What evidence do you have that he

20 oversaw the verbatim display of the four sentences

21 you allege that the defendants infringed of your

22 copyrights?

23 A. I just answered that question. The

24 sworn statement of the Forrests.

25 Q. Okay. Other than the sworn statements

1 FISCHER 143

2 that you allege the Forrests said, do you have any

3 evidence that Shane Gebauer oversaw or participated

4 in the verbatim display of your copyrighted works?

5 A. Other than their sworn testimony?

6 Q. Yes.

7 A. No.

8 Q. Do you have any evidence that Steve

9 Forrest oversaw or participated or approved in the

10 verbatim display of your copyrighted works?

11 A. Other than his management of the

12 company, no.

13 Q. Do you have any evidence that Sandra

14 Forrest oversaw, participated in, or approved of the

15 verbatim display of your copyrighted works?

16 A. Other than her management of the

17 company, no. Management and ownership, I should

18 add, for both Forrests.

19 Q. What evidence do you have that Shane

20 Gebauer knew the copyright management information

21 had been removed from your photos or your text?

22 A. Okay. Wait a minute. You're putting

23 that in the passive voice. What evidence do I have

24 that Shane knew that it had been removed?

25 Q. Yes. Mr. Fischer, these are based on

1 FISCHER 144

2 your allegations in your complaint.

3 A. Well, Mr. Hudson, I have to say that he

4 knew because it happened. So if it happened and he

5 didn't know -- if you're saying that this was an

6 inadvertent mistake, I don't know how such

7 inadvertent mistakes happen.

8 Q. Again, what evidence do you have that

9 Shane Gebauer knew that your copyright management

10 information had been removed?

11 A. I'm going to impute knowledge on the

12 results. In other words, the fact that it was

13 removed means that he knew it happened.

14 Q. Other than imputing knowledge to the

15 results, do you have any other evidence --

16 A. None whatsoever.

17 Q. Sir, let me finish.

18 Other than imputing evidence to the

19 results, do you have any evidence that Shane Gebauer

20 knew that copyright information had been removed?

21 A. He was responsible for the website and

22 catalog at the time. His responsibility, according

23 to the Forrests, was total. Therefore, the buck

24 stops with Shane. So he is responsible. And if he

25 doesn't know, he should know, because it's his

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1 FISCHER 150

2 Bee-Quick, and they were buying what they thought

3 was the same product.

4 Q. Has anybody told you that they thought

5 they were buying Fischer's Bee-Quick, but they'd get

6 Natural Honey Harvester?

7 A. No specific individual, no. But as a

8 matter of law, a holdover franchisee, if you will,

9 who continues to use the marks that he's no longer

10 authorized to use is counterfeiting. So, you know,

11 it's the mere use of it that causes the actual

12 confusion.

13 MR. MICHELEN: Just answer the question.

14 Q. Are you aware of anybody who was

15 confused between Bee-Quick and Natural Honey

16 Harvester?

17 A. Everyone who bought Natural Honey

18 Harvester.

19 Q. Who?

20 A. Everyone who --

21 Q. Tell me their names.

22 A. -- everyone who purchased it.

23 Q. Tell me their names.

24 A. Give me a customer list.

25 Q. Do you know anybody's name who was

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1 FISCHER 151

2 confused between Bee-Quick and Natural Honey

3 Harvester?

4 A. Not at this point, no. Pending

5 discovery.

6 Q. Are you alleging that any of the

7 defendants sold a product named Bee-Quick that they

8 did not purchase from you or from Dadant?

9 A. No, I think they used my intellectual

10 property in the marketing of a different product,

11 Natural Honey Harvester.

12 Q. Did they ever use your trademark in the

13 marketing of Natural Honey Harvester?

14 A. Yes.

15 Q. How?

16 A. They put it on their web pages where

17 they were selling Natural Honey Harvester.

18 Q. Where did they put it on their web

19 pages?

20 A. On the visible area of the web page at

21 the top.

22 Q. What is that called?

23 A. It's the address bar.

24 Q. Or the URL?

25 A. Yeah.

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1 FISCHER 153

2 domain names?

3 A. No, I'm a computer jerk.

4 Q. Is Brushy Mountain in the business of

5 selling domain names?

6 A. I don't know.

7 Q. Do you have any reason to believe that

8 Brush Mountain is in the business of selling domain

9 names?

10 A. No. That's not gonna get you anywhere.

11 MR. MICHELEN: Jim, don't talk until a

12 question is posed.

13 THE WITNESS: I'm sorry.

14 Q. Now, did Brushy Mountain, on their

15 website, use the same URL that they sold Bee-Quick

16 as they did when they switched over and started

17 selling Natural Honey Harvester?

18 A. Yes. They continued to use the same

19 URL, so the web page was at the same address, if you

20 will, the edited web page that sold Natural Honey

21 Harvester. After a time, though, they changed that.

22 It was the other ancillary products that were left,

23 and left to this day at the same URLs. The bundle

24 with the fume board and the -- the ten frame fume

25 board, the eight frame fume board, the images --

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1 FISCHER 170

2 Q. Okay.

3 A. And that was when we moved contract

4 bottlers.

5 Q. How have you been damaged by Brushy

6 Mountain using the phrase, for years we have

7 promoted the use of a natural product to harvest

8 honey, but an unreliable supply of such a product

9 has forced us to come out with our own?

10 A. Well, I listed for you a number of

11 competitors that have cropped up since then. You --

12 I don't know how much you've talked with Greg. Have

13 you talked with Greg very much about --

14 MR. MICHELEN: Jim, answer the

15 questions. Do not pose questions.

16 THE WITNESS: Okay.

17 MR. MICHELEN: How have you been

18 damaged? That's the question.

19 A. I have been damaged because by

20 besmirching my reputation in a disparaging manner in

21 their false advertising, they have prompted

22 opportunists to come along and make a knockoff just

23 like theirs.

24 Q. Is Bee-Quick protected by a patent?

25 A. No.

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1 FISCHER 173

2 risk.

3 Q. Are you aware -- let me ask the question

4 again.

5 Are you aware of any beekeeper that has

6 lost their organic certification by using Natural

7 Honey Harvester?

8 A. No. Because we were able to fix that

9 problem. You're right. No. There was a risk of

10 it, yes. There was a risk of it. And actually,

11 that's what I alleged, was the risk of it, not

12 anyone actually losing it. So if you're going to

13 ask me questions about what I said, ask about what I

14 freakin' said. Don't read words into what I said.

15 Read what I said --

16 MR. MICHELEN: He asked you a

17 question --

18 THE WITNESS: No, he's pissing me off.

19 MR. MICHELEN: Jim. He asked you

20 whether you knew anybody who lost their organic

21 certification. Whether that's what you said in

22 the complaint or not doesn't matter.

23 THE WITNESS: He's playing with people's

24 livelihoods here --

25 MR. MICHELEN: No, he's not playing with

1 FISCHER 177

2 Q. Other than purchase orders, did you have

3 a written agreement with Brushy Mountain regarding

4 Bee-Quick?

5 A. Not to my knowledge.

6 Q. Did you ever have any written agreement

7 with Steve Forrest regarding Bee-Quick?

8 A. As an individual?

9 Q. Yes.

10 A. No.

11 Q. Did you ever have any written agreement

12 with Shane Gebauer individually regarding Bee-Quick?

13 A. No.

14 Q. Did you ever have any written agreement

15 with Sandra Forrest individually regarding

16 Bee-Quick?

17 A. No.

18 Q. Do you have a written agreement with

19 Dadant?

20 A. That would be proprietary.

21 Q. I'm just asking yes or no, not the

22 content.

23 MR. MICHELEN: Yes or no. That's not

24 proprietary.

25 THE WITNESS: The existence of an

1 FISCHER 176

2 A. He runs the equipment. It's his toy. I

3 just pay him a fee to run the -- you know, they do

4 like commercial analysis.

5 THE WITNESS: Is that my phone?

6 MR. MICHELEN: Yes. Can he take it? Do

7 you want to take it?

8 THE WITNESS: Yeah, all right.

9 (Whereupon, a recess was taken.)

10 A. Do we want Hugh's last name?

11 Q. If you could give me Hugh's last name, I

12 would appreciate it.

13 A. I think it's Dannenhauer,

14 D-A-N-N-E-N-H-A-U-E-R. I've got his number at home.

15 But I've used several commercial test labs.

16 Q. Do you have a written contract with

17 Brushy Mountain Bee Farm?

18 A. No, we've never had a written contract.

19 We drafted up agreements, if you will, or we made

20 agreements about various products at various times,

21 but concerning Bee-Quick, we had purchase orders.

22 That's it.

23 Q. Did you ever have a written contract

24 with Brushy Mountain concerning Bee-Quick?

25 A. Yes. Purchase orders.

1 FISCHER 183

2 read about the product.

3 Q. And what years did you supply the

4 Bee-Quick brochures to Brushy Mountain?

5 A. Initially, I think Dadant provided them

6 on my behalf to Brushy. So when Brushy started to

7 buy direct, I believe at that point I was throwing

8 brochures in with cases of product that I would ship

9 them so that they would be resupplied. Occasionally

10 they would run low and specifically ask for more

11 brochures.

12 Q. Who would specifically ask for the

13 brochures?

14 A. Random people. I don't know. It wasn't

15 a normal thing from Betsy, because she didn't, you

16 know, she didn't ship that. That wasn't a salable

17 product. So it would have been whoever was packing

18 for a show that would go oh, we need more brochures.

19 Q. Did Steve ever request more brochures?

20 A. I don't remember. I mean, it could have

21 been.

22 Q. Did Sandra Forrest request more

23 brochures?

24 A. Sandy really didn't interact with me

25 that much. So on all of your questions, I don't

1 FISCHER 184

2 believe Sandy and I ever really interacted anything

3 other than socially, really.

4 Q. Did Shane Gebauer ask for any of your

5 Bee-Quick brochures?

6 A. Probably when he was at Betterbee before

7 he was at Brushy, but I doubt it. I think people

8 stopped using the brochures about, I don't know,

9 2008 or 9, because everybody knew what it was. I

10 really don't know who might have been still putting

11 the brochures out. You know, it was to introduce

12 the product.

13 Q. When do you believe that Brushy Mountain

14 first got their shipment of the Bee-Quick brochures?

15 MR. MICHELEN: I'm sorry. For the first

16 time ever?

17 MR. HUDSON: Yes.

18 A. Well, the first time was -- I think I

19 handed that to Steve at that Tennessee beekeeper

20 meeting in 2000 when I first pitched him for the

21 product, and he said didn't have enough margin for

22 him.

23 Q. Did you ever display the Bee-Quick

24 brochures at any type of beekeeping meetings or

25 beekeeping shows?

1 FISCHER 210

2 form of trademark infringement as described in the

3 trademark infringement statute, for the 97th time.

4 Q. Are you aware that Shane Gebauer ordered

5 anyone to engage with trademark infringement?

6 A. No.

7 Q. Are you aware that Sandy Forrest, or

8 Sandra Forrest, ordered anyone to engage in

9 trademark infringement?

10 A. No.

11 Q. Do you have any evidence that Steve

12 Forrest ordered anyone to engage in trademark

13 infringement?

14 A. No.

15 Q. Do you have any proof or evidence that

16 Shane Gebauer participated in or approved of anyone

17 engaging in copyright infringement?

18 A. I'm sorry. He engaged in, approve --

19 Q. Participated in and approved --

20 A. Yeah.

21 Q. -- in copyright infringement.

22 A. I have the sworn statements of the

23 Forrests that Shane Gebauer is the only person who

24 was responsible for the website and the catalog from

25 what I guess to be 2009 forward, because they said

1 FISCHER 211

2 two years after he was hired. So he was the

3 responsible party doing things at their behest as

4 owners, so he was the one either engaging or

5 approving of it, because they said he was

6 responsible for the publication of the items that

7 infringed.

8 Q. Other than the testimony of the

9 Forrests, do you have any other evidence that Shane

10 Gebauer participated in and approved of any

11 copyright infringements?

12 A. No. Just the sworn statements of your

13 clients.

14 Q. Do you have any proof that Sandra

15 Forrest participated in or approved of copyright

16 infringement?

17 A. Only to the extent that she said that

18 she assisted Shane with some of the website and

19 catalog work after he took over doing it. In other

20 words, even though he was still responsible, I think

21 she said that she worked with him on that

22 occasionally.

23 Q. Do you have any other evidence?

24 A. No.

25 Q. Do you have any evidence that Steve

1 FISCHER 212

2 Forrest participated in or approved of copyright

3 infringement?

4 A. Nothing other than his sworn testimony

5 to that effect.

6 Q. You allege a bait and switch.

7 A. No, I think that was the judge's phrase,

8 actually.

9 Q. You put it in your complaint, bait and

10 switch.

11 A. I think the judge said it first in 2015.

12 I don't think we put it in the complaint until after

13 he said it.

14 Q. You still allege it.

15 So what do you mean by bait and switch?

16 A. Bait and switch, that's what they did.

17 They misused the trademark to attract customers via

18 search engines, and by people that might have

19 bookmarked the page, and when they get there,

20 there's no Bee-Quick there, and all there is is

21 Natural Honey Harvester. So by misusing the

22 trademarks and by misusing my surname as the address

23 of the page in the URL, they appear much higher. I

24 mean, there's metadata, which we haven't really

25 looked at metadata because it doesn't really affect

1 FISCHER 213

2 search engines anymore, but URLs rank very high in

3 how pages appear in search results. So that's the

4 bait and switch.

5 Q. Are you aware of anybody who's been the

6 victim of a bait and switch by Brushy Mountain?

7 A. Every single customer who bought Honey

8 Harvester.

9 Q. Name names.

10 A. Give me a customer list.

11 Q. Are you aware of anybody today that you

12 can name their name that was the --

13 A. No, you have not provided that

14 information, sir.

15 Q. Please let me finish my question.

16 Are you aware of anybody, sitting here

17 today, by name, that was the victim of a bait and

18 switch with Brushy Mountain Bee Farm?

19 A. There's no one sitting here that has

20 been a victim of the bait and switch --

21 MR. MICHELEN: He said as you sit here

22 today --

23 A. No, I don't know. No.

24 Q. So we have a clear record, can you tell

25 me the name of anybody who has been the victim of a

1 FISCHER 214

2 bait and switch scheme by Brushy Mountain Bee Farm?

3 A. Not yet.

4 MR. HUDSON: Can we take a couple-minute

5 break?

6 (Whereupon, a recess was taken.)

7 MR. HUDSON: Mr. Fischer, thank you for

8 your time. I don't have any other questions.

9 I will say on the record, what I am

10 doing is, all the exhibits that we have marked

11 today, I'm going to take the originals back

12 with me to Charlotte. When I get back to

13 Charlotte, someone in my office is going to

14 copy all of them, and they will e-mail them or

15 e-mail a link to your counsel.

16 (Page break for jurat.)

17

18

19

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24

25

Exhibit B

Shane Gebauer (12/16/16)

Shane Gebauer (12/16/16)

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1 A. President.
 2 Q. Of what entity?
 3 A. Brushy Mountain Bee Farm.
 4 Q. Now, when for the first time did you begin to have any
 5 involvement with Brushy Mountain Bee Farm?
 6 A. I became employed with them about nine or ten years
 7 ago. 2007.
 8 Q. And where were you employed previously?
 9 A. Betterbee.
 10 Q. And what is Betterbee?
 11 A. It is a bee supply company.
 12 Q. Where are they located?
 13 A. Greenwich, New York.
 14 Q. And what was your title at Betterbee when you left and
 15 joined Brushy?
 16 A. General manager.
 17 Q. For how long were you general manager of the
 18 Betterbee?
 19 A. It was about four years.
 20 Q. Was that also when you began with the company? Did
 21 you start as general manager or did you start at a
 22 different position?
 23 A. I started out just helping on weekends.
 24 Q. When was that? What year was that?
 25 A. That was just a few months prior to me coming on as

1 MR. HUDSON: Objection to the form.
 2 A. I don't know what you mean.
 3 Q. Well, when did you first become aware that there was a
 4 lack of availability for Bee-Quick?
 5 A. When I started with Brushy.
 6 Q. What were the circumstances? What would happen, that
 7 you can recall?
 8 A. We couldn't get the product.
 9 Q. You would run out of stock that you had purchased and
 10 reorder, for example?
 11 A. Yes.
 12 Q. And it wouldn't come in time to fulfill orders?
 13 A. Correct.
 14 Q. How would you communicate this to Mr. Fischer, if at
 15 all?
 16 A. I would -- it was our purchasing agent that largely
 17 communicated.
 18 Q. And who was the purchasing agent when you first
 19 started there?
 20 A. Betsy Brey.
 21 Q. Can you spell the last name for the reporter?
 22 A. I'm sorry? The last name?
 23 Q. Spell her last name for the reporter, please.
 24 A. B-R-E-Y.
 25 Q. Is Ms. Brey still employed by Brushy Mountain?

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Shane Gebauer (12/16/16)

Shane Gebauer (12/16/16)

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1 Bee-Quick?
 2 MR. HUDSON: Objection to the form.
 3 A. I'm not sure I understand your question.
 4 Q. Well, earlier you mentioned that there was some issues
 5 with availability. Is that correct?
 6 A. Availability of Bee-Quick. Correct.
 7 Q. Correct. Yes. What I'm asking you is is this e-mail
 8 here dated December 10, 2010, related to that
 9 unavailability that you were talking about before?
 10 A. It doesn't specifically mention that but it sort of
 11 implies that, yes.
 12 Q. And the Steve there where it says, "Per Steve and
 13 Shane," that refers to Steve Forrest. Is that
 14 correct, to your knowledge?
 15 A. Yes.
 16 Q. And this is from Betsy. That would be Betsy Brey that
 17 we spoke about earlier?
 18 A. Correct.
 19 Q. Okay. So now, if you could take a look, let's
 20 take -- let's just do 008, Seth, as Exhibit 3.
 21 MR. HUDSON: It's marked and Shane has
 22 it.
 23 Q. Take a look at that. Do you recognize that exhibit,
 24 Mr. Gabauer?
 25 A. What do you mean?

1 Q. And in what way?
 2 A. Applied to a fume board, piece of equipment which is
 3 then applied to the hive.
 4 Q. And what would be the result of doing that?
 5 A. Under proper conditions, the bees would vacate the
 6 equipment.
 7 Q. And that would allow the beekeeper to collect the
 8 honey without having the hive full of bees?
 9 A. With less bees, yes.
 10 Q. Now, did you ever personally use Bee-Quick?
 11 A. Probably.
 12 Q. Now, did Brushy Mountain Bee Farm develop Natural
 13 Honey Harvester to be a replacement of Bee-Quick?
 14 A. I'm not sure what you mean by develop.
 15 Q. Well, did you guys decide to start selling Natural
 16 Honey Harvester to compete with Bee-Quick?
 17 A. We started selling Natural Honey Harvester to offer a
 18 product that wasn't available.
 19 Q. And why wasn't it available?
 20 A. We couldn't get it.
 21 Q. By that you mean your reference to Bee-Quick?
 22 A. Correct.
 23 Q. Okay. So Natural Honey Harvester, the idea was that
 24 it would do basically the same thing that Bee-Quick
 25 would do?

Shane Gebauer (12/16/16)

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1 A. It would vacate the supers -- it would vacate the bees
2 from the equipment, yes.
3 Q. Spray it on a fume pad?
4 A. Yes.
5 Q. Who decided to start distributing that product?
6 A. I honestly don't recall.
7 Q. Did you have a role in that decision?
8 A. I'm sure it was a collaborative conversation.
9 Q. And who decided to call it Natural Honey Harvester?
10 A. I believe that was Steve.
11 Q. Forrest?
12 A. Yes.
13 Q. And did Brushy Mountain Bee Farm, Inc. develop the
14 product itself that it actually created?
15 A. No.
16 Q. So -- who, back when it first began being
17 manufactured, who actually created the product?
18 A. I don't recall. It was in existence, so I don't know
19 who created it.
20 Q. When you came on board in '07, it was in existence?
21 A. No.
22 Q. I'm sorry. In 2011, when you first started making it,
23 it was already in existence?
24 A. My recollection, it was a product that was already in
25 existence, yes.

Exhibit C

Sandra Forrest (2/10/17)

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- 1 Q. Now, this product basically competed with another
2 called Bee-Go; correct?
- 3 A. That's true, yes.
- 4 Q. And when you first started to carry the -- Fischer's
5 Bee-Quick product, did Mr. Fischer provide you with
6 any brochures, fliers, material to show how he had
7 sold and marketed in his product beforehand?
- 8 MR. HUDSON: You cut up there, Oscar.
- 9 Q. Before you first started carrying Fischer's Bee-Quick
10 in your catalog, did Mr. Fischer provide you with any
11 brochures or fliers -- or distribute Bee-Quick?
- 12 A. He provided brochures as a table display when we set
13 up the Bee-Quick at shows.
- 14 Q. But I meant before, in other words, now you're going
15 to carry his product in the catalog. Did he ever say
16 to you, hey, here's how I describe it so you could use
17 that language for your catalog?
- 18 A. No. He may have given us some points of sale, but I
19 wrote the description as I did with 95 percent of the
20 products in our catalog.
- 21 Q. So you wrote the phrase, "Are you tired of your spouse
22 making you sleep in the garage"?
- 23 A. Yes.
- 24 Q. And you wrote the phrase, "Are you tired of using a
25 hazardous product on the bees you love"?

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Sandra Forrest (2/10/17)

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- 1 A. I think so. I'm not sure about that one. But I'm
2 definitely sure about the husband thing because I
3 discussed that with many women at the bee shows.
- 4 Q. When you mean many women, you mean you discussed the
5 problems with Bee-Go?
- 6 A. Right.
- 7 Q. And, by the way, if I told you the first year you
8 started carrying Bee-Quick in your catalog was 2002,
9 would that sound about right?
- 10 A. I didn't know we had sold it that long, but, you know,
11 time flies by, so I don't know.
- 12 Q. Okay. What about the phrase "Fischer's Bee-Quick is a
13 safe, gentle, and pleasant way to harvest your honey,"
14 is that your authorship?
- 15 A. That's kind of general, so I don't -- I don't
16 really -- I don't know.
- 17 Q. Well, I mean, did you write it all -- I would imagine
18 you wrote the content all at once, right, it wasn't in
19 various pieces?
- 20 A. Well, no, but I -- so, I guess I did. But I don't --
21 I remember the phrase about the other thing because,
22 like I said, because of the conversations I had with
23 customers. The other is just kind of a general thing
24 about the product. So --
- 25 Q. So you don't have an independent recollection of

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Sandra Forrest (2/10/17)

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- 1 A. That wasn't my job.
- 2 Q. Did you ever exchange any e-mails with him, to your
3 recollection, about that?
- 4 A. No, I did not.
- 5 Q. Now, when Shane came onto the company, did you
6 continue to work with him to, you know, work on the
7 catalog and the website together?
- 8 A. I worked for two years after -- on and off on a
9 part-time kind of basis after Shane came.
- 10 Q. You told us you started kind of reducing your duties
11 at that point; correct?
- 12 A. That's right, yes.
- 13 Q. Okay. But whatever duties that you did continue to
14 have, were they still related mostly to the catalog
15 and the website?
- 16 A. No, they weren't. I supervised the construction of a
17 new building that we put on the place, a new addition,
18 and I took minutes at our weekly staff meeting. And
19 that's how I heard about the problem with Fischer.
- 20 Q. So then your previous duties related to the catalog
21 and the website were transferred over to Shane; is
22 that fair to say?
- 23 A. That's right because he had the most computer
24 experience and we were moving in that direction and I
25 didn't know anything about it.

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Exhibit D

Stephen Forrest (2/10/17)

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1 but -- but not really.

2 Q. Now, what was it? Can you describe it?

3 A. It was dated 10/10/12 and it had like three columns on

4 it. But, like I said, you've got a copy of it, so --

5 MR. MICHELEN: Mr. Hudson, do you have

6 Exhibit 1 from Mr. Gebauer's deposition there

7 with you?

8 MR. HUDSON: Yeah, I've got it. I'll

9 put it in front of the witness.

10 Q. So this document, Mr. Forrest, has previously been

11 marked as Exhibit 1 at the deposition of Shane Gebauer

12 on December 16 of last year. Take a look at that. Is

13 that the piece of paper you're talking about?

14 A. No, sir.

15 Q. Okay. So you're talking about a piece of paper with

16 three columns on it?

17 A. Yes, sir.

18 Q. Now, did that piece of paper, to your recollection,

19 include a product description?

20 A. You know, I went to my file, I pulled it out, I gave

21 it to Seth. I'm not sure.

22 Q. Now, I'll ask you about this phrase, "Are you tired of

23 your spouse making you sleep in the garage," does that

24 phrase sound familiar to you?

25 A. Oh, yes, sir, I remember when we came up with it.

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Stephen Forrest (2/10/17)

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1 Q. So that's something you came up with?

2 A. Yes, sir.

3 Q. And when did you come up with that?

4 A. You know, to be honest with you, when we were coming

5 up here today, I couldn't remember if it was room 200

6 or room 300. I just don't have much of a memory at

7 all. But you can look in our catalogs and when we

8 first put it in our catalog is when we came up with

9 it. And I can tell you how we came about it too. We

10 had a woman come up to us and we were talking about --

11 we were trying to sell Fischer's product and we were

12 telling this woman about Bee-Go and how bad it was.

13 And she said -- she said I -- she said, "That's he go.

14 When my husband uses that, he goes and he stays in the

15 garage." And that's how we came up with that.

16 Q. And you decided to use that as a description for

17 Fischer's Bee-Quick?

18 A. Yes, sir. You can look through our catalog through

19 all the years and through our ads and you'll see that

20 we've always talked badly about Bee-Go. The first

21 customer that I had take Bee-Go had bees in the wall

22 of his house and he put Bee-Go in there to run them

23 out, which it didn't work, and they ended up selling

24 their house. You cannot imagine how horrible this

25 stuff smells.

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Stephen Forrest (2/10/17)

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1 hazardous product of the bees you love," did you write

2 that?

3 A. I'm not sure.

4 Q. And by you, I mean you or Sandy.

5 A. Well, we worked together as a team doing it. And, I'm

6 sorry, I just can't remember. I would think so

7 because we were always going after natural products as

8 hard as we could go, which is why we picked up

9 Fischer's product. We believed that chemicals should

10 stay out of the hives and they shouldn't put on there

11 and that's why we were looking for those.

12 Q. Right. That's why the other -- another phrase that

13 was in the catalog was a natural nontoxic blend of

14 oils and herbal extracts; correct?

15 A. Again, I'm sorry. When -- I'm sorry, I can't tell you

16 how we came up with that. But that woman came to me

17 and I thought it was so clever about he go, I do

18 remember that we did that.

19 Q. Now, when you started carrying Fischer's Bee-Quick, do

20 you recall what year that was?

21 A. No, sir.

22 Q. Am I correct that you carried it continuously up until

23 around the time of the lawsuit?

24 A. Oh, no. We couldn't get it for -- I don't remember

25 how long it was, you know, he wouldn't supply us with

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Stephen Forrest (2/10/17)

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1 it and it put us in a terrible shape. I don't

2 remember how many months it was. I know Shane would

3 have a much better touch on that. But once we ran out

4 of it, we never sold it after that.

5 Q. And do you remember what year that was?

6 A. No, sir.

7 Q. Now, by the way, did you -- when you would distribute,

8 you know, products, whether they were sold online or

9 sold at your farm -- withdrawn.

10 Whenever you sold a product that you shipped,

11 and by that I mean it was sold online or sold through

12 the mail through your catalog, would you include the

13 current year's -- the most current catalog?

14 A. It stopped you again. You'll have to repeat it.

15 Q. Would you include the company's current annual catalog

16 with every shipment that you sent out to new

17 customers?

18 A. We did some years and some years we didn't. I'm not

19 sure what period you're talking about. You know, we

20 did some years and I don't -- you know, I never really

21 wanted to do it, but some years we did and some years

22 we didn't.

23 Q. Well, let's say from 20 -- 2009, let's say, to 2013,

24 did you include an annual catalog when you shipped

25 products to customers through the mail?

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Stephen Forrest (2/10/17)

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1 Midstates did it for us. But after -- after Shane
 2 took it over, I have no idea about any of that.
 3 Q. When did Shane get involved?
 4 A. I'm sorry, I --
 5 Q. I said before Shane got involved, you already had a
 6 website; correct?
 7 A. We did.
 8 Q. And before Shane got involved, who was predominantly
 9 in charge of the content for the website?
 10 A. Sandy and myself were involved in the content and she
 11 worked with the webmaster.
 12 Q. Right, to do the physical changes to the website?
 13 A. Right. Now, Sandy would have a better handle on this
 14 but -- I'm a very low-tech redneck, you know, so I try
 15 not to, you know --
 16 Q. Okay. Now, let's go to the point where you stated
 17 there was some issues with the supply of Fischer's
 18 Bee-Quick. Can you talk about that? When did that
 19 first arise?
 20 A. I can't tell you when it was and I can't tell you how
 21 long it was, but it was a terrible thing. It was
 22 months and I just don't remember how many it was. And
 23 I do remember seeing Jim at a bee meeting and he told
 24 me that his problem was bottling the stuff and I told
 25 him that if he would send it to us, we would bottle it

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1 for him, and he never did any of that. It was a
 2 horrible thing because when people want to take their
 3 honey off, if they don't take it off, the bees mess it
 4 up. So when they need it, they need it, and we
 5 couldn't get it. I wish I could remember how many
 6 months it was, but I can't. It was -- I think it was
 7 more than six months. I don't know.
 8 Q. Was that --
 9 A. I don't know though, I'm sorry.
 10 Q. So it was for about a six-month period where he did
 11 not supply new products?
 12 A. I'm sorry, I just don't know. And we wrote him and
 13 wrote him and wrote him and begged him and begged him
 14 and we never would get it for a long period of time.
 15 Q. Okay. Did he ever offer an explanation other than,
 16 you know, he was having trouble bottling it?
 17 A. That was when I saw him face to face at a bee meeting
 18 together and I don't remember when that was. I don't
 19 know who, you know, the excuses that he made. I think
 20 you've got all of Shane's e-mails and there's so many
 21 of them, but I had no contact with him at all.
 22 Q. Okay. Now, let's go to the point where Shane Gebauer
 23 joins the company. When was that?
 24 A. I'm not sure.
 25 Q. Well, let's do it in terms of --

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1 more and more and more. I just -- I'm sorry, I just
 2 can't tell you.
 3 Q. Was one of those responsibilities revealing the
 4 content of the catalog?
 5 A. Well, when Shane came, for the first two years I held
 6 his hand and sat down with him and went through the
 7 catalogs, went through the copy, went through the
 8 pricing, went through the wholesale pricing. And
 9 after two years, I didn't do it anymore. I wanted to
 10 get out of it. I didn't enjoy doing the -- excuse me?
 11 Q. No, please finish your answer.
 12 A. After I had been through the catalog with him and
 13 worked on the catalog for two years, it was totally
 14 his baby.
 15 Q. Because you thought at that point he had been
 16 comfortable learning the nature of the operation?
 17 MR. HUDSON: Objection to form.
 18 A. As I said, he was from a competing company and I
 19 thought the catalog was better and the company was
 20 coming up. I thought he was -- you know, that's why
 21 we hired him, was to improve our business, which he
 22 the.
 23 Q. And the same with the website?
 24 A. He --
 25 Q. Actually took over the content and the development of

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Stephen Forrest (2/10/17)

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1 the website?
 2 A. Totally. When he was at Betterbee, they -- the
 3 software that they were using up there had a website
 4 that was tied to it. And when he came down, he took
 5 that over and he was in charge of all of that. He did
 6 the website completely.
 7 Q. And if I use the word SiteLink, S-i-t-e-L-i-n-k, would
 8 that refresh you as to the website platform you're
 9 talking about?
 10 A. That is the website platform, I believe. Let me
 11 reiterate, you know, I just -- I am very low-tech and
 12 he handled every bit of this.
 13 Q. So at some point as part of the agreement with Brushy
 14 Mountain, Shane began getting equity in the company;
 15 correct?
 16 A. That's correct. I'm sure Shane could look at the
 17 stock certificates that we gave him and tell you
 18 exactly when that was.
 19 Q. So whenever he would get any part of the company, it
 20 would be done through an issuance of a stock
 21 certificate?
 22 A. That's correct.
 23 Q. And those were stock certificates that were previously
 24 in either yours or in Mrs. Forrest's name?
 25 A. That's correct.

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1 A. You got Skyped and I missed the question.

2 Q. Did the Brushy Mountain catalog ever carry Natural
3 Honey Harvester before this issue with Bee-Quick?

4 MR. HUDSON: Objection to form.

5 A. Absolutely not.

6 Q. Now, when you acquired the product, did the vendor
7 send you a product description or did you write the
8 product description yourself or something else?

9 A. Shane wrote the product description himself.

10 Q. Now -- and that was a product description that was
11 used in the catalog for Natural Honey Harvester?

12 A. Yes.

13 Q. Are you aware that you continued to use the are you
14 tired of your spouse, you know, sleeping in the garage
15 language for that?

16 A. I was so glad to get out of the catalog, no, I
17 never -- you know, I didn't -- there's so much copy,
18 you know, there's so many pages and so much copy,
19 that, no, I didn't know that.

20 Q. So what about the text that actually appears on the
21 label of Natural Honey Harvester, does that come from
22 the vendor or company created itself?

23 MR. HUDSON: Objection to form.

24 A. Shane created it.

25 Q. And so is that -- is Natural Honey Harvester something

Exhibit E

Defendant, as direct competitor of Plaintiff, seeks to harass and/or undermine Plaintiff's proprietary interest. However, Plaintiffs' Marks were on all the goods sold by Plaintiff. The marks were also displayed on Plaintiff's website as deposited with the Copyright office. The marks were used since the date listed as first use in commerce on Plaintiff's trademark application and registration as exhibited in Plaintiff's complaint. Plaintiff's mark was regularly advertised in Bee Culture magazine, the American Bee Journal, Defendant's catalog, and Plaintiff's website.

8. Identify any instances of actual confusion involving Plaintiff's Mark and goods or services provided by the Forrests.

Answer: Each and every sale of Defendants' "Natural Honey Harvester" product is a case of actual confusion. The action brought by Plaintiff is for Trademark Counterfeiting, not Trademark Infringement. In counterfeiting actions it is unnecessary to perform an in-depth, step-by-step examination of the likelihood of confusion because "counterfeit marks are inherently confusing". *Philip Morris USA Inc. v. Felizardo*, No. 03 Civ. 5891, 2004 WL 1375277, at *5 (S.D.N.Y. June 18, 2004). In any event, and over objection, Plaintiff is unaware of any instance of actual consumer confusion.

Defendants' own website comments show actual confusion – see attached clip from "customer reviews and ratings" of Natural Honey Harvester at end of this document.

9. Identify the individual(s) who participated in the conception, selection, and adoption of Plaintiff's Registered Trademark, describing in detail the role or participation of each such individual in such activity.

Answer: Plaintiff is the sole participant in the conception, selection and adoption of Plaintiff's Registered Trademark.

10. State when and how you first became aware that the Defendants were allegedly infringing your alleged copyrights.

Answer: Defendants mailed their 2011 catalog in March containing the infringement of Plaintiff's Registered Copyrighted Works. A subsequent review of Defendants' website revealed the addition infringement on Defendant's website of both Plaintiff's Registered Copyrighted Works and Registered Trademark. That is when Plaintiff first became aware of Defendants' infringing use of Plaintiff's intellectual property.

11. Please provide an accounting of all damages you are seeking from Defendants, including a calculation and explanation of each of said damage categories and amounts for each cause of action alleged in your Second Amended Complaint.

Answer: See Rule 26(a) Disclosure. Plaintiff seeks only statutory damages.



bees really love this stuff

I tried harvesting with this was very disappointed. I sprayed the fume board and placed it on the super. After a few minutes I checked and the super was still full of bees. So I smoked it heavily and put the inner cover and top back on and went to the next hive. On this one I really soaked the fume board and placed it on the super. After waiting about 5 minutes, I lifted the fume board and it was completely covered in bees as well as the super. The bees stayed on the soaked fume board until I brushed them off. I just gave up on this and went to the house. My suit was covered in bees by then so I sprayed them directly with the stuff and they refused to fly off. It was as if I had sprayed sugar water on them. The first bottle I bought last year worked well but this new stuff was a complete waste of time and money.

- Charles Gardner, SC

Customer Comment showing that Brushy's "new stuff" was confused with Fischer's Bee-Quick
This is clear and compelling evidence of "actual confusion", not that we need to prove it

Exhibit F

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Seth L. Hudson

From: James Fischer <james.fischer@gmail.com>
Sent: Tuesday, July 21, 2015 8:18 PM
To: Teresa Bush-Dugar
Cc: Seth L. Hudson
Subject: RE: Fischer v. Forrest (14-CV-1304); (14-CV-1307)

Seth:

I'm sorry, I am out of the country until at least August 2nd, so I simply cannot accept a "7 day" deadline. I brought nothing "legal" with me on this trip.

To more clearly address several points at first reading, your clients have not been sued for trademark infringement, they have been sued for trademark counterfeiting. I can't imagine how there might be a misunderstanding on this point, and while I understand that you wish to defend this as if it were a trademark infringement case, the defenses available to you are more limited when your clients counterfeited a trademark and even more limited when your clients profitably used the trademark as an authorized dealer for the product for eight years. This is the basis for our difference of opinion on what is relevant.

I have not yet sent you my own requests for document production as the needs of my elderly parents have taken priority over everything else for the past 60 days. I ask for patience on both my answers to your requests, and my own requests for your clients.

In regard to your claims about what might be or might have been "common knowledge" in the beekeeping industry, please understand that the false advertising claim extends beyond the false "unreliable supply" statement to include multiple other false statements made by the Defendants both in print catalogs and on the Defendants' website.

I hope this suffices for the present, as it is about the best I can do until I get back to the USA.

Jim

From: Teresa Bush-Dugar [mailto:tbushdugar@worldpatents.com]
Sent: Tuesday, July 21, 2015 4:06 PM
To: james.fischer@gmail.com
Cc: Daniel Cahn; Seth L. Hudson
Subject: Fischer v. Forrest (14-CV-1304); (14-CV-1307)

Re: Fischer v. Forrest
Case Nos. 14-CV-1304 and 14-CV-1307

Dear Mr. Fischer:

Attached, please find a letter as executed by Seth Hudson for the above-identified matters. A copy was also mailed to you today.

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Please do not hesitate to contact us if you have any questions.

Best Regards,

Teresa Bush-Dugar
Paralegal



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